

EPA Region 5 Records Ctr.



275071

**CONFIDENTIAL AND INADMISSIBLE  
SETTLEMENT COMMUNICATION**

**DELIVERY VIA FACSIMILE**

**MEMORANDUM**

TO: Annette Lang and Mike O'Callaghan

FROM: Dave Northrop

DATE: October 4, 2002

RE: Skinner Landfill Litigation

I writing in response to Annette's letter sent to me yesterday. Cases decided by the Sixth Circuit and other courts hold that a PRP is not liable under CERCLA Section 107(a) if the PRP demonstrates that its hazardous substances did not cause or contribute to the plaintiff's incurrence of response costs. Aeronca has asserted this defense in its answers to the complaints. The leading case in the Sixth Circuit is United States v. Township of Brighton, Michigan, 153 F.3d 307, 47 ERC 1161 (6<sup>th</sup> Cir., 1998), in which the court stated, at 47 ERC 1169, "[D]efendants who can show . . . that they are not responsible for any of the harm, have effectively fixed their own share of the damages at zero. No causation means no liability, despite Section 9607(a)'s strict liability scheme." A later Sixth Circuit decision, Bob's Beverage, Inc. v. Acme Inc., \_\_\_ F.3d \_\_\_, 53 ERC 1061 (6<sup>th</sup> Cir., 2001), also recognized that lack of causation of response costs is a liability defense. At issue there was alleged ownership liability by a former owner. The court held that the former owner was not liable under Section 107(a), because there was "no evidence that any release that occurred during the ownership of the Merkel Defendants caused any increase in the response costs later incurred by the Appellants." 53 ERC at 1063. In fact, the court suggested that it was the plaintiff's burden to establish causation, stating at 1064, "Because Appellants [plaintiffs below] failed to demonstrate that a release by the Merkel Defendants affected the Appellants' response costs, Appellants have failed to prove their cost recovery cause of action."

Other courts have recognized this liability defense. See, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664 (5<sup>th</sup> Cir., 1989); United States v. Alcan Aluminum Corp., 990 F.2d 711 (5<sup>th</sup> Cir., 1993); Dent v. Beazer Materials and Services, Inc., 45 ERC 2089 (4<sup>th</sup> Cir., 1998). Alcan Aluminum was cited with approval by the Sixth Circuit in Brighton Township.

These cases are liability cases, not allocation cases. Thus, they are as applicable to the government's joint and several liability claim under Section 107(a) as they are to the work group's Section 113 contribution claim. As to the latter claim, however, the Sixth Circuit has also recognized that a district court may assign to a liable PRP an allocation of zero if its hazardous substances did not affect the costs of remediation, Kalamazoo River Study Group v. Rockwell Int'l Corp., \_\_\_ F.3d \_\_\_, 53 ERC 1705 (6<sup>th</sup> Cir., 2001)(citing with approval PMC,

Inc. v Sherwin-Williams Co., 151 F.3d 610 (7<sup>th</sup> Cir., 1998). Thus, even if liable under Section 107(a), Aeronca may avoid a judgment in favor of the work group.

We feel that we have a good chance of persuading the court that Aeronca is not liable in this case. First, there is *no* direct evidence of what Aeronca sent to the landfill. We will contend that the court should not speculate on what was sent, and whether it contained hazardous substances. Second, if the court concludes that Aeronca sent potassium permanganate to the landfill (due to Aeronca's request to the board of health for permission to do so), we are prepared to submit an expert report that concludes that the concentration of manganese in surface and ground water was not increased by that disposal. Rather, those elevated concentrations resulted from the increased leaching of naturally occurring manganese from soil caused by the placement of organic material in the landfill. Moreover, potassium permanganate, as an oxidizing agent, would tend to counteract the "reducing" conditions in a landfill that cause increased mobilization of the naturally occurring manganese. Lastly, potassium permanganate is frequently used as a remediation agent. It has been shown to be an effective chemical oxidizing agent when injected into soil and ground water that is contaminated with chlorinated compounds, accelerating the breakdown of those compounds to nonhazardous substances. This practice is contrary to the notion that potassium permanganate is a substance that creates hazardous conditions when deposited in soil or water. Thus, the court may conclude that Aeronca's waste did not contribute to the hazardous conditions at the landfill that caused the incurrence of response costs.

In light of this, we think that our current offer to pay our allocated share of response costs is a substantial and favorable offer that deserves your serious consideration. I hope that the above discussion is helpful. Please contact me after reviewing the above.

Cc: John Furbay